

Calendar No. 459

105TH CONGRESS
2^D SESSION

S. 2271

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 7, 1998

Mr. SESSIONS (for Mr. HATCH) introduced the following bill; which was read the first time

JULY 8, 1998

Read the second time and placed on the calendar

A BILL

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Property Rights Imple-
3 mentation Act of 1998”.

4 **SEC. 2. FINDINGS.**

5 Congress finds that—

6 (1) property rights have been abrogated by the
7 application of laws, regulations, and other actions by
8 all levels of government that adversely affect the
9 value and the ability to make reasonable use of pri-
10 vate property;

11 (2) certain provisions of sections 1346 and
12 1402 and chapter 91 of title 28, United States Code
13 (commonly known as the Tucker Act), that delineate
14 the jurisdiction of courts hearing property rights
15 claims, frustrate the ability of a property owner to
16 obtain full relief for violation founded upon the fifth
17 and fourteenth amendments of the United States
18 Constitution;

19 (3) current law—

20 (A) has no sound basis for splitting juris-
21 diction between two courts in cases where con-
22 stitutionally protected property rights are at
23 stake;

24 (B) adds to the complexity and cost of
25 takings and litigation, adversely affecting tax-
26 payers and property owners;

1 (C) forces a property owner, who seeks
2 just compensation from the Federal Govern-
3 ment, to elect between equitable relief in the
4 district court and monetary relief (the value of
5 the property taken) in the United States Court
6 of Federal Claims;

7 (D) is used to urge dismissal in the district
8 court in complaints against the Federal Govern-
9 ment, on the ground that the plaintiff should
10 seek just compensation in the Court of Federal
11 Claims;

12 (E) is used to urge dismissal in the Court
13 of Federal Claims in complaints against the
14 Federal Government, on the ground that the
15 plaintiff should seek equitable relief in district
16 court; and

17 (F) forces a property owner to first pay to
18 litigate an action in a State court, before a
19 Federal judge can decide whether local govern-
20 ment has denied property rights safeguarded by
21 the United States Constitution;

22 (4) property owners cannot fully vindicate prop-
23 erty rights in one lawsuit and their claims may be
24 time barred in a subsequent action;

1 (5) property owners should be able to fully re-
2 cover for a taking of their private property in one
3 court;

4 (6) certain provisions of section 1346 and 1402
5 and chapter 91 of title 28, United States Code (com-
6 monly known as the Tucker Act) should be amend-
7 ed, giving both the district courts of the United
8 States and the Court of Federal Claims jurisdiction
9 to hear all claims relating to property rights in com-
10 plaints against the Federal Government;

11 (7) section 1500 of title 28, United States
12 Code, which denies the Court of Federal Claims ju-
13 risdiction to entertain a suit which is pending in an-
14 other court and made by the same plaintiff, should
15 be repealed;

16 (8) Federal and local authorities, through com-
17 plex, costly, repetitive and unconstitutional permit-
18 ting, variance, and licensing procedures, have denied
19 property owners their fifth and fourteenth amend-
20 ment rights under the United States Constitution to
21 the use, enjoyment, and disposition of, and exclusion
22 of others from, their property, and to safeguard
23 those rights, there is a need to determine what con-
24 stitutes a final decision of an agency in order to

1 allow claimants the ability to protect their property
2 rights in a court of law;

3 (9) a Federal judge should decide the merits of
4 cases where a property owner seeks redress solely for
5 infringements of rights safeguarded by the United
6 States Constitution, and where no claim of a viola-
7 tion of State law is alleged; and

8 (10) certain provisions of sections 1343, 1346,
9 and 1491 of title 28, United States Code, should be
10 amended to clarify when a claim for redress of con-
11 stitutionally protected property rights is sufficiently
12 ripe so a Federal judge may decide the merits of the
13 allegations.

14 **SEC. 3. PURPOSES.**

15 The purposes of this Act are to—

16 (1) establish a clear, uniform, and efficient ju-
17 dicial process whereby aggrieved property owners
18 can obtain vindication of property rights guaranteed
19 by the fifth and fourteenth amendments to the
20 United States Constitution and this Act;

21 (2) amend the Tucker Act, including the repeal
22 of section 1500 of title 28, United States Code;

23 (3) rectify the unduly onerous and expensive re-
24 quirement that an owner of real property, seeking
25 redress under section 1979 of the Revised Statutes

of the United States (42 U.S.C. 1983) for the infringement of property rights protected by the fifth and fourteenth amendments of the United States Constitution, is required to first litigate Federal constitutional issues in a State court before obtaining access to the Federal courts;

(4) provide for uniformity in the application of the ripeness doctrine in cases where constitutional rights to use and enjoy real property are allegedly infringed, by providing that a final agency decision may be adjudicated by a Federal court on the merits after—

(A) the pertinent government body denies a meaningful application to develop the land in question; and

(B)(i) the property owner seeks a waiver by or brings an appeal to an administrative agency from such denial; and

(ii) such waiver or appeal is not approved; and

(5) confirm the proper role of a State or territory to prevent land uses that are a nuisance under applicable law.

SEC. 4. DEFINITIONS.

In this Act, the term—

1 (1) “agency action” means any action, inaction,
2 or decision taken by a Federal agency or other gov-
3 ernment agency that at the time of such action, in-
4 action, or decision adversely affects private property
5 rights;

6 (2) “district court”—

7 (A) means a district court of the United
8 States with appropriate jurisdiction; and

9 (B) includes the United States District
10 Court of Guam, the United States District
11 Court of the Virgin Islands, or the District
12 Court for the Northern Mariana Islands;

13 (3) “Federal agency” means a department,
14 agency, independent agency, or instrumentality of
15 the United States, including any military depart-
16 ment, Government corporation, Government-con-
17 trolled corporation, or other establishment in the ex-
18 ecutive branch of the United States Government;

19 (4) “owner” means the owner or possessor of
20 property or rights in property at the time the taking
21 occurs, including when—

22 (A) the statute, regulation, rule, order,
23 guideline, policy, or action is passed or promul-
24 gated; or

1 (B) the permit, license, authorization, or
 2 governmental permission is denied or sus-
 3 pended;

4 (5) “private property” or “property” means all
 5 interests constituting property, as defined by Fed-
 6 eral or State law, protected under the fifth and four-
 7 teenth amendments to the United States Constitu-
 8 tion; and

9 (6) “taking of private property”, “taking”, or
 10 “take” means any action whereby restricting the
 11 ownership, alienability, possession, or use of private
 12 property is an object of that action and is taken so
 13 as to require compensation under the fifth amend-
 14 ment to the United States Constitution, including by
 15 physical invasion, regulation, exaction, condition, or
 16 other means.

17 **SEC. 5. PRIVATE PROPERTY ACTIONS.**

18 (a) IN GENERAL.—An owner may file a civil action
 19 under this section to challenge the validity of any Federal
 20 agency action as a violation of the fifth amendment to the
 21 United States Constitution in a district court or the
 22 United States Court of Federal Claims.

23 (b) CONCURRENT JURISDICTION.—Notwithstanding
 24 any other provision of law and notwithstanding the issues
 25 involved, the relief sought, or the amount in controversy,

1 the district court and the United States Court of Federal
2 Claims shall each have concurrent jurisdiction over both
3 claims for monetary relief and claims seeking invalidation
4 of any Act of Congress or any regulation of a Federal
5 agency affecting private property rights.

6 (c) ELECTION.—The plaintiff may elect to file an ac-
7 tion under this section in a district court or the United
8 States Court of Federal Claims.

9 (d) WAIVER OF SOVEREIGN IMMUNITY.—This section
10 constitutes express waiver of the sovereign immunity of
11 the United States with respect to an action filed under
12 this section.

13 (e) APPEALS.—The United States Court of Appeals
14 for the Federal Circuit shall have exclusive jurisdiction of
15 any action filed under this section, regardless of whether
16 the jurisdiction of such action is based in whole or part
17 under this section.

18 (f) STATUTE OF LIMITATIONS.—The statute of limi-
19 tations for any action filed under this section shall be 6
20 years after the date of the taking of private property.

21 (g) ATTORNEYS' FEES AND COSTS.—In issuing any
22 final order in any action filed under this section, the court
23 may award costs of litigation (including reasonable attor-
24 neys' fees) to any prevailing plaintiff.

1 **SEC. 6. JURISDICTION OF UNITED STATES COURT OF FED-**
2 **ERAL CLAIMS AND UNITED STATES DISTRICT**
3 **COURTS.**

4 (a) UNITED STATES COURT OF FEDERAL CLAIMS.—

5 (1) JURISDICTION.—Section 1491(a) of title
6 28, United States Code, is amended—

7 (A) in paragraph (1) by amending the first
8 sentence to read as follows: “The United States
9 Court of Federal Claims shall have jurisdiction
10 to render judgment upon any claim against the
11 United States for monetary relief founded ei-
12 ther upon the Constitution or any Act of Con-
13 gress or any regulation of an executive depart-
14 ment or upon any express or implied contract
15 with the United States, in cases not sounding
16 in tort, or for invalidation of any Act of Con-
17 gress or any regulation of an executive depart-
18 ment under section 5 of the Citizens Access to
19 Justice Act of 1998.”;

20 (B) in paragraph (2) by inserting before
21 the first sentence the following: “In any case
22 within its jurisdiction, the Court of Federal
23 Claims shall have the power to grant injunctive
24 and declaratory relief when appropriate.”; and

25 (C) by adding at the end the following new
26 paragraphs:

1 “(3) In cases otherwise within its jurisdiction,
2 the Court of Federal Claims shall also have supple-
3 mental jurisdiction, concurrent with the courts des-
4 ignated under section 1346(b), to render judgment
5 upon any related tort claim authorized under section
6 2674.

7 “(4) In proceedings within the jurisdiction of
8 the Court of Federal Claims which constitute judi-
9 cial review of agency action (rather than de novo
10 proceedings), the provisions of section 706 of title 5
11 shall apply.

12 “(5)(A) Any claim brought under this sub-
13 section founded upon a constitutional right to use
14 and enjoy real property, but allegedly infringed or
15 taken by the United States, shall be ripe for adju-
16 dication upon a final decision rendered by the
17 United States, that causes actual and concrete in-
18 jury to the party seeking redress.

19 “(B) For purposes of this paragraph, a final
20 decision exists if—

21 “(i) the United States makes a definitive
22 decision regarding the extent of permissible
23 uses on real property that has been allegedly in-
24 fringed or taken; and

1 “(ii) one meaningful application to use the
 2 property has been submitted but has not been
 3 approved within a reasonable time, and the
 4 party seeking redress has applied for one appeal
 5 or waiver which has not been approved within
 6 a reasonable time, where the applicable law of
 7 the United States provides a mechanism for ap-
 8 peal or waiver.

9 “(C)(i) The party seeking redress shall not be
 10 required to submit any application or reapplication,
 11 or apply for any appeal or waiver required under
 12 this section, if the district court determines that
 13 such action would be futile.

14 “(ii) In this subparagraph, the term ‘futile’
 15 means the inability of an owner of real property to
 16 seek or obtain approvals to use such real property,
 17 and the hardship endured by such inability, as de-
 18 fined under applicable land use and environmental
 19 law.

20 “(D) Nothing in this paragraph alters the sub-
 21 stantive law of takings of property, including the
 22 burden of proof borne by the plaintiff.”.

23 (2) PENDENCY OF CLAIMS IN OTHER
 24 COURTS.—

1 (A) IN GENERAL.—Section 1500 of title
2 28, United States Code is repealed.

3 (B) TECHNICAL AND CONFORMING AMEND-
4 MENT.—The table of sections for chapter 91 of
5 title 28, United States Code, is amended by
6 striking out the item relating to section 1500.

7 (b) DISTRICT COURT JURISDICTION.—

8 (1) CITIZEN ACCESS TO JUSTICE ACTION.—Sec-
9 tion 1346(a) of title 28, United States Code, is
10 amended by adding after paragraph (2) the follow-
11 ing:

12 “(3) Any civil action filed under section 5 of the
13 Citizens Access to Justice Act of 1998.”.

14 (2) UNITED STATES AS DEFENDANT.—Section
15 1346 of title 28, United States Code, is amended by
16 adding at the end the following:

17 “(h)(1) Any claim brought under subsection (a) that
18 is founded upon a property right or privilege secured by
19 the Constitution, but was allegedly infringed or taken by
20 the United States, shall be ripe for adjudication upon a
21 final decision rendered by the United States, that causes
22 actual and concrete injury to the party seeking redress.

23 “(2)(A) For purposes of this subsection, a final deci-
24 sion exists if—

1 “(i) the United States makes a definitive deci-
2 sion regarding the extent of permissible uses on the
3 property that has been allegedly infringed or taken;
4 and

5 “(ii) one meaningful application to use the
6 property has been submitted but has not been ap-
7 proved within a reasonable time, and the party seek-
8 ing redress has applied for one appeal or waiver
9 which has not been approved within a reasonable
10 time, where the applicable law of the United States
11 provides a mechanism for appeal to or waiver by an
12 administrative agency.

13 “(B)(i) The party seeking redress shall not be re-
14 quired to submit any application or reapplication, or apply
15 for any appeal or waiver required under this section, if
16 the district court determines that such action would be
17 futile.

18 “(ii) In this subparagraph, the term ‘futile’ means
19 the inability of an owner of real property to seek or obtain
20 approvals to use such real property, and the hardship en-
21 dured by such inability, as defined under applicable land
22 use and environmental law.

23 “(3) Nothing in this subsection alters the substantive
24 law of takings of property, including the burden of proof
25 borne by the plaintiff.”.

1 (c) DISTRICT COURT CIVIL RIGHTS JURISDICTION;
 2 ABSTENTION.—Section 1343 of title 28, United States
 3 Code, is amending by adding at the end the following:

4 “(c) Whenever a district court exercises jurisdiction
 5 under subsection (a), the court shall not abstain from or
 6 relinquish jurisdiction to a State court because the party
 7 seeking redress—

8 “(1) brings a prior or concurrent proceeding be-
 9 fore a State, territory, or local tribunal as required
 10 under subsection (e)(3);

11 “(2) asserts claims under State or local law
 12 pendent to and arising from the same core of opera-
 13 tive facts as a claim for the taking of real property;
 14 or

15 “(3) asserts a claim for the taking of real prop-
 16 erty that requires interpretation of State, territory,
 17 or local laws.

18 “(d) A district court that exercises jurisdiction under
 19 subsection (a) in an action in which the operative facts
 20 concern the uses of real property may abstain where the
 21 party seeking redress—

22 “(1) has not submitted a meaningful applica-
 23 tion, as defined by the locality concerned within that
 24 State or territory, to use such real property; and

1 “(2) challenges whether an action of the appli-
2 cable locality exceeds the authority conferred upon
3 the locality under the applicable zoning or planning
4 enabling statute of the State or territory.

5 “(e)(1) Where the district court has jurisdiction over
6 an action under subsection (a) in which the operative facts
7 concern the uses of real property and which cannot be de-
8 cided without resolution of an unsettled question of State
9 law, the district court may certify the question of State
10 law to the highest appellate court of that State. After the
11 State appellate court resolves the question certified to it,
12 the district court shall proceed with resolving the merits.

13 “(2) In making a decision whether to certify a ques-
14 tion of State law under this subsection, the district court
15 may consider whether the question of State law—

16 “(A) will significantly affect the merits of the
17 injured party’s Federal claim; and

18 “(B) is patently unclear.

19 “(f)(1) Any claim or action brought under section
20 1979 of the Revised Statutes of the United States (42
21 U.S.C. 1983) to redress the deprivation of a right or privi-
22 lege to use and enjoy real property as secured by the Con-
23 stitution shall be ripe for adjudication by the district
24 courts upon a final decision rendered by any person acting
25 under color of any statute, ordinance, regulation, custom,

1 or usage, of any State or territory of the United States,
2 that causes actual and concrete injury to the party seeking
3 redress.

4 “(2)(A) For purposes of this subsection, a final deci-
5 sion exists if—

6 “(i) any person acting under color of any stat-
7 ute, ordinance, regulation, custom, or usage, of any
8 State or territory of the United States, makes a de-
9 finitive decision regarding the extent of permissible
10 uses on the property that has been allegedly in-
11 fringed or taken;

12 “(ii)(I) one meaningful application, as defined
13 by applicable law concerned within that State or ter-
14 ritory, to use the property has been submitted but
15 has not been approved within a reasonable time, and
16 the party seeking redress has applied for one appeal
17 or waiver which has not been approved within a rea-
18 sonable time, where the applicable statute, ordi-
19 nance, custom, or usage provides a mechanism for
20 appeal to or waiver by an administrative agency; or

21 “(II) one meaningful application, as defined by
22 the locality concerned within that State or territory,
23 to use the property has been submitted but has not
24 been approved within a reasonable time, and the dis-
25 approval at a minimum specifies in writing the

1 range of use, density, or intensity of development of
2 the property that would be approved, with any con-
3 ditions therefor, and the party seeking redress has
4 resubmitted another meaningful application taking
5 into account the terms of the disapproval, except
6 that—

7 “(aa) if no such reapplication is submitted,
8 then a final decision shall not have been
9 reached for purposes of this subsection, except
10 as provided in subparagraph (B); and

11 “(bb) if the reapplication is not approved
12 within a reasonable time, or if the reapplication
13 is not required under subparagraph (B), then a
14 final decision exists for purposes of this sub-
15 section if the party seeking redress has applied
16 for one appeal or waiver with respect to the dis-
17 approval, which has not been approved within a
18 reasonable time, where the applicable statute,
19 ordinance, custom, or usage provides a mecha-
20 nism of appeal or waiver by an administrative
21 agency; and

22 “(iii) in a case involving the uses of real prop-
23 erty, where the applicable statute or ordinance pro-
24 vides for review of the case by elected officials, the

1 party seeking redress has applied for but is denied
2 such review.

3 “(B)(i) The party seeking redress shall not be re-
4 quired to submit any application or reapplication, or apply
5 for any appeal or waiver as required under this subsection,
6 upon determination by the district court that such action
7 would be futile.

8 “(ii) In this subparagraph, the term ‘futile’ means
9 the inability of an owner of real property to seek or obtain
10 approvals to use such real property, and the hardship en-
11 dured by such inability, as defined under applicable land
12 use and environmental law.

13 “(3) For purposes of this subsection, a final decision
14 shall not require the party seeking redress to exhaust judi-
15 cial remedies provided by any State or territory of the
16 United States.

17 “(g) Nothing in subsection (c), (d), (e), or (f) alters
18 the substantive law of takings of property, including the
19 burden of proof borne by the plaintiff.”.

20 **SEC. 7. ATTORNEYS FEES FOR LOCALITIES.**

21 Section 722(b) of the Revised Statutes (42 U.S.C.
22 1988(b)) is amended—

23 (1) by striking “In any action” and inserting
24 “(1) Subject to paragraphs (2) and (3), in any ac-
25 tion”; and

1 (2) by adding at the end the following:

2 “(2) In an action arising under section 1979 of
3 the Revised Statutes (42 U.S.C. 1983), where the
4 taking of real property is alleged, a district court, in
5 its discretion, may hold the party seeking redress
6 liable for a reasonable attorney’s fee and costs where
7 the takings claim is not substantially justified, un-
8 less special circumstances make an award of such
9 fees unjust. Whether or not the position of the party
10 seeking redress was substantially justified shall be
11 determined on the basis of any administrative and
12 judicial record, as a whole, which is made in the dis-
13 trict court adjudication for which fees and other ex-
14 penses are sought.

15 “(3) In an action arising under section 1979 of
16 the Revised Statutes (42 U.S.C. 1983) where the
17 taking of real property is alleged, the district court
18 shall decide any motion to dismiss such claim on an
19 expedited basis. Where such a motion is granted and
20 the takings claim is dismissed with prejudice, the
21 non-moving party may be liable for a reasonable at-
22 torney’s fee and costs at the discretion of the district
23 court, unless special circumstances make an award
24 of such fees unjust.”.

1 **SEC. 8. DUTY OF NOTICE TO DEFENDANTS.**

2 Section 1979 of the Revised Statutes (42 U.S.C.
3 1983) is amended—

4 (1) by inserting “(a)” before “Every person”;
5 and

6 (2) by adding at the end the following:

7 “(b) A party seeking redress under this section for
8 a taking of real property without the payment of com-
9 pensation shall not commence an action in district court
10 before 60 days after the date on which written notice has
11 been given to any potential defendant.”.

12 **SEC. 9. DUTY OF NOTICE TO OWNERS.**

13 Whenever a Federal agency takes an agency action
14 limiting the use of private property that may be affected
15 by this Act (including the amendments made by this Act),
16 the agency shall give notice to the owners of that property
17 explaining their rights under this Act and the procedures
18 for obtaining any compensation that may be due to them
19 under this Act.

20 **SEC. 10. RULES OF CONSTRUCTION.**

21 Nothing in this Act shall be construed to interfere
22 with the authority of any State to create additional prop-
23 erty rights.

1 **SEC. 11. EFFECTIVE DATE.**

2 This Act shall take effect on the date of enactment
3 of this Act and shall apply to any agency action that oc-
4 curs on or after such date.

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A BILL

To simplify and expedite access to the Federal courts for injured parties whose rights and privileges, secured by the United States Constitution, have been deprived by final actions of Federal agencies, or other government officials or entities acting under color of State law, and for other purposes.

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